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**Sent:** Friday, October 29, 2010 2:28 PM **To:** PosLimits < PosLimits @CFTC.gov>

Cc: Graham Harper <gharper@deltastrat.com>; Scott Parsons

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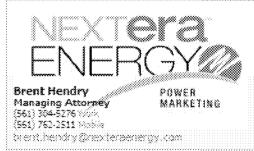
Stengle, Kate < Kate. Stengle@fpl.com >; Silverstein, Larry

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**Subject:** Comment on the Aggregation of Position Limits

**Attach:** Position Limit Pre-Comment Letter.pdf

Attached please find pre-comment letter submitted by NextEra Energy Power Marketing, LLC.



FL Authorized House Counsel Not a Member of the Florida Bar

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October 29, 2010

David A. Stawick, Secretary Commodity Futures Trading Commission Three Lafayette Center 1155 21st Street, N.W. Washington, DC 20581 VIA ELECTRONIC MAIL

Re: Aggregation of Position Limits under Section 737 of Dodd-Frank Act

Dear Secretary Stawick:

On October 21, 2010, NextEra Energy Power Marketing, LLC attended several meetings at the Commodity Futures Trading Commission (CFTC), to discuss various rulemakings relevant to the Dodd-Frank Act. As a result of these meetings, it became clear that it would be beneficial to provide written comments outlining the specific concerns we raised with respect to Section 737 of Title VII of the Dodd-Frank Act concerning the possibility of the aggregation of position limits applying across multiple affiliates.

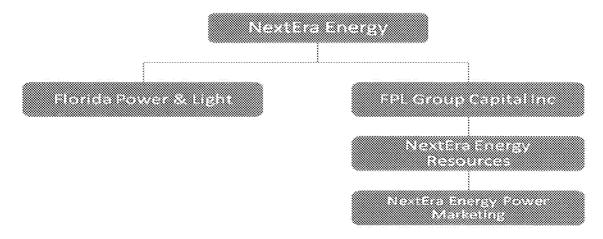
We are specifically concerned that an overly broad drafting of the rule regarding the aggregation of position limits pursuant to the requirement to establish rules under Section 737 could have unintended consequences resulting in violations of certain federal and state laws applicable to energy companies. For example, certain regulatory requirements imposed by the Federal Energy Regulatory Commission (FERC) that apply to traditionally regulated public utilities and its affiliated energy marketers would render the aggregation of positions across these types of affiliates in violation of certain FERC regulations.

Specifically, interactions between a traditional, franchised public utility possessing captive customers and its "market-regulated power sales affiliates" (i.e., affiliated energy marketers) that are authorized to transact wholesale sales of electric energy at market-based rates pursuant to Section 205 of the Federal Power Act (FPA) are subject to the Affiliate Restrictions Regulations imposed by FERC. In relevant part, the Affiliate Restrictions Regulations require the functional separation and independent operation of such entities, and are intended to prevent potential affiliate abuse, including cross-subsidization issues, that could benefit shareholders to the detriment of captive ratepayers. The violation of such regulations can result in an affiliated energy marketer's loss of its market-based rate authority.

<sup>&</sup>lt;sup>1</sup> 16 U.S.C. § 824d; 18 C.F.R. § 35.39.

<sup>&</sup>lt;sup>2</sup> Specifically, the FERC Affiliate Restrictions Regulations require public utilities and their "market regulated power sales affiliates" to operate separately to the maximum extent practicable 18 C.F.R. § 35.39(c)(2)(i). Traditional utilities and their "market-regulated power sales affiliates" are also prohibited from sharing any senior officers and other supervisory personnel that engage in directing, organizing or executing generation or marketing functions. *Id.* § 35.39(c)(2)(ii). Under FERC's Affiliate Restrictions Regulations, a traditional utility may not share any non-public "market information" with employees of market-regulated power sales affiliates if that information can be used to

As depicted on the chart below NextEra Energy, Inc. is the parent of Florida Power & Light Company (FPL), a vertically integrated public utility located in Florida. NextEra Energy, Inc. is also the ultimate parent of NextEra Energy Power Marketing, LLC, (NextEra) a merchant trading affiliate that transacts in energy markets outside Florida.



Under the Dodd-Frank Act the CFTC now has the authority to set position limits not only on contracts listed by designated contract markets but also across swap contracts that perform or affect a significant price discovery function (Designated Contracts). To the extent that a traditional utility, such as FPL, and its "market-regulated power sales affiliate", such as NextEra, transact in Designated Contracts and are forced to share position information or discuss how to allocate an aggregated position limit in order to ensure that they are in "global" corporate compliance with aggregate position limits for the relevant Designated Contracts, then each entity would effectively be in violation of FERC's Affiliate Restrictions Regulations. Two of the key notable Affiliate Restrictions Regulations are the independent operation requirement and the prohibition on the sharing of market information. The failure to comply with FERC's Affiliate Restrictions Regulations, even an inadvertent failure, could expose NextEra and FPL to civil penalties of up to \$1 million per violation per day and could result in the suspension or revocation of their respective authorizations to engage in wholesale sales of electric energy at market-based rates under FPA Section 205.4

We respectfully request that the CFTC refrain from drafting aggregation requirements that would result in NextEra or FPL violating applicable federal or state law. In the alternative, and to provide greater regulatory certainty, we suggest that the CFTC draft language to include an exemption for parties whose efforts to comply with any final rules regarding the aggregation of position limits would result in a violation of federal or state laws, rules and regulations.

the detriment of captive customers, unless such information is simultaneously disclosed to the public. *Id.* § 35.39(d)(1).

<sup>&</sup>lt;sup>3</sup> See Florida Power Corp, et al., 111 FERC ¶ 61,243 (2005)(requiring the refund of approximately \$6.5 million to ratepayers, in relevant part, for identified violations of the independent functioning rules and prohibition on sharing market information as set forth in FERC's Code of Conduct requirements (precursor to the Affiliate Restrictions Regulations) applicable to franchised public utilities and marketing affiliates authorized to engage in wholesale sales of electric energy at market-based rates).

<sup>&</sup>lt;sup>4</sup> 16 U.S.C. § 8250-1 (setting forth FERC's civil penalty authority under Part II of the FPA).

In addition to the concerns raised above regarding FERC Affiliate Restrictions Regulations, there are also some broader concerns about potential aggregation rules disregarding the structural and functional independence of affiliated, but separate, legal entities. Legal entities that have not acted in concert in entering into Designated Contracts and instead act and operate independently from any other legal entities within the corporate family should continue to be treated independently.

Based on the foregoing two sets of concerns, we respectfully submit that the rules should provide that, to the extent the trading activities of an energy company and its affiliates transacting in the same Designated Contracts are not undertaken at the direction, management or control of a common corporate owner, they should be treated as separate and independent traders for purposes of determining compliance with applicable federal position limits. To address the fact that some entities do not maintain separate operations and control, the above rule could contain an exception, which would allow for the aggregation of position limits across such affiliates, if such entities jointly (i) hold or control an ownership or equity interest of 10% or greater in the *same* position in Designated Contracts and (ii) transact pursuant to an express or implied agreement or understanding as if their separate positions in Designated Contracts were held by, or the trading of such positions were done by, a single person.<sup>5</sup>

Respectfully submitted.

Lawrence Silverstein

Senior Vice President and

Managing Director Power Marketing

NextEra Energy Power Marketing

cc: Dan Berkovitz, General Counsel, Office of General Counsel
Terry Arbit, Deputy General Counsel, Office of General Counsel
David Van Wagner, Chief Counsel, Division of Market Oversight
Ali Hosseini, Attorney, Division of Market Oversight
Steve Sherrod, Director, Market Surveillance
Bruce Fekrat, Attorney Advisor, Division of Market Oversight

<sup>&</sup>lt;sup>5</sup> The content of the issues set forth in this pre-comment lefter are substantially similar to comments on the aggregation of position limits submitted by the Working Group of Commercial Energy Firms, of which NextEra is a member, on April 26, 2010 by Hunton & Williams LLP to the request for public comment set forth in the Notice of Proposed Rulemaking ("NOPR") issued by the CFTC and published in the Federal Register on January 26, 2010, Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations, Comment File No. 10-002